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Supreme Court,
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1947

No. 570

CARL MEYER,
Petitioner,

vs.

TERRITORY OF HAWAII,
Respondent.

PETITION FOR WRIT OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Summary statement of the matter involved	2
Questions presented	5
Reasons relied on for allowance of writ	5
The decision of the Circuit Court of Appeals, like that of the Hawaiian Supreme Court, clearly deprives the petitioner of due process of law and of a fair and impartial trial	5
Conclusion	14

Table of Authorities Cited

Cases	Pages
Cochran v. Kansas, 316 U. S. 255-258	6
Farrington v. Tokushige, 273 U. S. 284	6
Frank v. Magnum, 237 U. S. 209, 327	6
Herbert v. Louisiana, 272 U. S. 312, 316	7
Holden v. Hardy, 169 U. S. 366, 389	7
Codes and Statutes	
Hawaiian Code, Section 9558, Title 23	7
Judicial Code, Section 128	4
Judicial Code, Section 240 (28 U.S.C.A., Sec. 347(a))	2
Revised Laws of Hawaii 1945:	
Section 3555	10
Section 6528	10
Section 9551	2
Section 9555	2
Rules Sup. Ct., 36 Haw. 753, Rule 3, par. 1(d)	3, 5
Constitutions	
United States Constitution:	
Fifth Amendment	4, 6
Fourteenth Amendment	6

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TERRITORY OF HAWAII,
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PETITION FOR WRIT OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Carl Meyer, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to review its final judgment, entered December 2, 1947, affirming the judgment of the Supreme Court of the Territory of Hawaii.

OPINIONS BELOW.

The opinion of the Supreme Court of the Territory of Hawaii is contained in the record. R. 298-302. The majority opinion of the Circuit Court of Appeals is contained in the record. R. 320-335. The dissenting opinion is also in the record. R. 335-346.

JURISDICTION.

Jurisdiction of this Court is invoked under section 240 of the Judicial Code. 28 U.S.C.A., sec. 347 (a).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii, the petitioner was indicted and found guilty of the crime of larceny in the first degree. R. 127, 130.

As provided by the laws of the Territory of Hawaii (see Secs. 9551 and 9555, Revised Laws of Hawaii 1945), a writ of error was issued by the Supreme Court of the Territory of Hawaii (R. 74) and duly returned. (R. 77-78.)

While his appeal in this case was pending before the Hawaiian Appellate Court, defendant was again tried and found guilty in the trial Court of the charge of larceny in the first degree as contained in another one of a series of indictments returned against him. From the judgment in the second case he also ap-

pealed to the Supreme Court of the Territory of Hawaii.

Briefs were filed by both parties, the opening and reply briefs being set out in the record before this Court, the former beginning at page 149 and the latter on page 291.

Extensive argument by both parties before the Supreme Court of the Territory of Hawaii was had on April 16 and 17, 1945. (R. 298.) By consent of the Court and the parties, both appeals were argued at the same time in the Supreme Court of Hawaii, though no formal order consolidating the appeals was ever entered. The matter was taken under advisement and thereafter on June 15, 1945, the Court of its own motion decided to dismiss the writs on the sole ground that a statement in appellant's opening brief that "appellant relies upon 'each and every one'" of his assignments of error is not a sufficient compliance with rule 3, paragraph 1(d) of the Rules of the Supreme Court, 36 Haw. 753. (R. 299). This decision of the Supreme Court of the Territory of Hawaii appears on pages 298 to 302 of the printed Record in this Court. The judgment that the Supreme Court of the Territory of Hawaii would not further consider the assignments of error, and dismissing the writ appears on page 303 of said Record.

In due time appellant presented to the Supreme Court a petition for rehearing (R. 305-312) which petition for rehearing was denied without argument. (R. 313.)

In due time following the order of the Supreme Court of the Territory of Hawaii denying appellant's petition for a rehearing, appellant perfected an appeal to the United States Circuit Court of Appeals for the Ninth Circuit in each of the cases (R. 2-3), that Court having jurisdiction to review the judgment of the Supreme Court of the Territory of Hawaii (R. 303) by reason of the provisions of section 128 of the Judicial Code.

The appeal raises the question of the correctness of the action of the Supreme Court of the Territory of Hawaii in dismissing his appeals, thereby violating the due process clause of the Fifth Amendment.

No order for consolidation of the appeals in the Circuit Court of Appeals having been asked or entered, separate petitions for certiorari are being presented to this Court. If granted, the appeals can readily be disposed of in a single opinion.

A majority of the judges of the Circuit Court of Appeals by whom this matter was heard, held that in the action of the Supreme Court of Hawaii there was no "clear departure from ordinary legal principles." (R. 335.)

Mr. Justice Denman, dissenting, said, "This is one of the clearest cases of violation of the due process clause of the Fifth Amendment that has come before this Court. Only by ignoring the essential facts, namely, the briefs filed in the two appeals can any other conclusion be reached." (R. 335.)

QUESTION PRESENTED.

Did the Supreme Court of the Territory of Hawaii in dismissing petitioner's writs of error deprive of due process of law and of a fair and impartial trial?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS, LIKE THAT OF THE HAWAIIAN SUPREME COURT, CLEARLY DEPRIVES THE PETITIONER OF DUE PROCESS OF LAW AND OF A FAIR AND IMPARTIAL TRIAL.

The decision of the Supreme Court of Hawaii is set out in full in the majority opinion in the Circuit Court of Appeals. (R. 320-324.) As there stated (R. 321), "The rule (of the Supreme Court of Hawaii) provides *inter alia* that an appellant's brief 'shall contain * * * a specification of the errors relied upon.'" (Rules Sup. Ct., 36 Haw. 753, rule 3, par. 1(d).)

Petitioner's opening briefs filed in the Supreme Court of the Territory of Hawaii, succinctly state justiciable questions of claimed error of most serious import in full compliance with rules of the Hawaiian Court. Because elsewhere in the briefs, in presenting some of the other claims of error, there is a failure to comply with the rule, the Hawaiian Court dismissed the appeals, thus refusing to consider those clearly and succinctly presented in proper form.

Admitting for the purposes of argument, failure of technical compliance with the rules as to other matters, the justiciable questions which are briefed with

complete compliance with the Court's rules stand out clearly. An appellant's right to due process on appeal should not be denied for a technical failure in presenting claimed errors clearly distinct from those properly presented.

The majority opinion of the Circuit Court of Appeals employs the following language:

> "The appellant strives to spell out a deprivation of his constitutional rights because the Territorial court 'dismissed the writ on a mere technicality'. We do not agree. The appellant does not argue, nor can he argue, that the rule itself is unconstitutional. As we have seen, he admits that he did not conform to a valid rule of the tribunal to which he was appealing. In our view, that ends the case."

It is respectfully submitted that such a holding is a clear violation of the principles established in *Frank v. Magnum,* 237 U.S. 209, 327, and *Cochran v. Kansas,* 316 U.S. 255-258. What is there said respecting due process in State Courts under the Fourteenth Amendment is of equal application to the due process under the Fifth Amendment in a Hawaiian Court. *Farrington v. Tokushige,* 273 U.S. 284.

In brief, one of the errors so presented is that at the trial of the second case the appeal in the first was pending, yet the trial Court permitted the introduction of evidence of appellant's conviction in the first. The claim that this is error is clearly a justiciable question of Hawaiian criminal law. In the first case one of the claimed errors is the prosecutor's at-

tempt to implicate the accused in six other crimes of which appellant not only had not been convicted but for which no criminal proceedings had been initiated, clearly a justiciable question under the Hawaiian law.

The character of these claimed errors so refused consideration makes the refusal a violation of the "immutable principles of justice which inhere in the very idea of free government," of *Holden v. Hardy*, 169 U.S. 366, 389, and of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," of *Herbert v. Louisiana*, 272 U.S. 312, 316.

Petitioner's brief filed in the Supreme Court of Hawaii first states his assignment of error accompanying his petition for writ of error as required by Title 23, Section 9558 of the Hawaiian Code. His brief later states the question as follows:

> "Group V, Question No. V.
>
> Did the Court err, in ruling that a prior conviction of the defendant (after it had been properly appealed, staying the mittimus, judgment and sentence of the Court) is competent matter to impeach the credibility of the defendant upon his cross-examination as a witness in his behalf?
>
> The above question No. 5 of Group V, is raised in this Appeal by the Assignments of Error Nos. XVIII and XXVIII as of record, and as hereinafter set forth and will be discussed collectively because both involve the same principle of law."

Then follows his presentation by repeating in full his assignment of error which specifies as follows:

"Assignment of Error No. XVIII.

The Circuit Court erred in permitting the prosecution to cross-examine the defendant while a witness for himself, over objection of the defendant, of and concerning a prior conviction of larceny of cattle, from which prior conviction, the defendant had appealed to the Supreme Court of the Territory of Hawaii, and the sentence and judgment of said prior conviction had been stayed by the court because of said Appeal, upon the theory of impeaching the credibility of the defendant as a witness for himself; the defendant objected to said cross-examination; that it was irrelevant, incompetent and immaterial and the defendant raised a federal question, that said cross-examination was made for the sole purpose of prejudicing the defendant with the jury, insinuating to the jury that defendant was a habitual criminal, and therefore guilty of the crime in question; further, that said appeal with a stay of the Judgment and Sentence, was not a prior conviction according to the law; the court overruled the objection of the defendant, to which ruling the defendant duly excepted to, in the presence of the jury. Transcript pages 304-308, as follows: * * *"

That it is entitled an "assignment" makes its content nonetheless a specification. Then follows the transcript of the trial Court's proceeding in which, in the absence of the jury, the appeal is shown to be pending, the return of the [illegible] and then the following:

"Q. Were you not convicted in this court on the 31st day of August, 1943, of Larceny in the

First Degree and that you stole three heads of cattle from Frank Teixeira in the Puukapu Homesteads on this Island?

Mr. Esposito (attorney for Appellant): Object, it is irrelevant, incompetent and immaterial; that this man has taken an appeal and that appeal stays mittimus and stays conviction.

The Court: Objection overruled.

Mr. Esposito: Exception.

The Court: Yes. You will please answer the question.

A. Yes."

Then is set forth the following assignment of error regarding the Court's instruction that the jury could consider the pending appeal:

"Assignment of Error No. XXVII.

The Circuit Court erred, in giving Territory's requested Instruction No. 10, over objection of defendant, to which ruling of the Court, in the presence of the jury, the defendant duly excepted, for the reason that said instruction was not the correct law.

'Evidence has been received to the effect that the defendant Carl Meyer, has heretofore been convicted of a crime. This evidence was received solely because it bears upon the moral character and upon the credibility of the defendant as a witness, and the fact of conviction is one that you may take into consideration in weighing his testimony. It must not be used for any other purpose whatever.' "

Then follow less than four pages of briefing of the two claimed errors. It concerns the two following

Hawaiian statutes which it is claimed have never been considered in this connection by the Hawaiian Supreme Court:

> "Section 3555. Stay in criminal cases. The giving of written notice in open court by the defendant or his counsel within ten days after judgment of intention to sue out a writ of error shall operate as a stay of execution, and shall suspend the operation of sentence in all criminal cases; * * *"

> "Section 5528. After previous conviction. When any person shall be proceeded against before any court of criminal jurisdiction for a subsequent offense in either case committed after any previous summary conviction or convictions a copy of the conviction certified by the proper officer of the court to which the summary conviction shall have been returned or proved to be a true copy, shall be sufficient evidence to prove a conviction of the former offense and the conviction shall be presumed to have been unappealed against until the contrary be shown."

Then follows the statement of cases from four states having similar statutes which have held such a question to be error warranting reversal.

To dismiss an appeal so cogently presenting such a justiciable question because of technical defects in briefing other claimed error, is to deprive petitioner of due process of law and of a fair and impartial trial.

The brief fully complies with the rules in presenting the claimed error of the prosecutor's questions to

appellant of other offenses for which he was not indicted.

This is briefed under the title:

"Did the Court err, in its conduct of the trial and deprive the defendant of a fair and impartial trial as guaranteed to him by the law of the land, in permitting the prosecutor to cross-examine the defendant upon specific acts of misconduct of the defendant based upon hearsay evidence, and concerning which alleged offenses the defendant had not been convicted?"

Again is stated the assignment of error at the beginning of the brief and repeated under the above title, as follows:

"Assignment of Error No. VI.

The Circuit Court erred, in denying and overruling the defendant's motion for mistrial, which were severally, and often jointly made by the defendant, at the occurrences of the misconduct and the admission of the poisonous evidence, and later repeated at the conclusion of all the evidence of both parties and before the settling of the instructions by the Court, and before counsel for both sides addressed the jury, that said Motions for Mistrial were properly made by the defendant in the presence of the jury; that full and complete reasons were assigned by the defendant to the Court for the said misconduct and the defendant duly excepted to the Court's ruling in the presence of the jury."

Then follow the portions of the record showing six questions by the prosecutor, to which appellant ob-

jected as incompetent and prejudicial and for which he moved a mistrial. They seek to implicate the accused with five other similar crimes for which he had not been indicted, much less convicted, and with a claimed adultery. They are

"Q. Sometime in 1938 did you or did you not steal one Holstein Hereford calf of W. M. S. Lindsey, senior, take it to your slaughter house pasture, brand it, cut off its ear, and then when caught by Lindsey and his worker who was Yokoyama, did you not cry and promise never to do it again?"

"Q. Did you not between February 1, 1941, and August 31, 1941 there in Kona steal one stag with horns, cut out near the ears one po-le and one steer with horn, red and white faced half wild from Manuel Gomes of Houaloa, take it to the Magoon lease and later slaughter it?"

"Did you or did you not between the first day of January or the 31st day of January, 1942 in the Puukapu Homesteads steal and slaughter a steer of James Spencer and immediately boil the hide and have it fed to the pigs?"

"Q. Did you or did you not between the first day of February, 1942 and the 28th day of February, 1942 steal there in the Puukapu Homesteads from Parker Ranch two fat breeding cows, slaughter them and boil their hides?"

"Q. Did you or did you not in the months of June or July, 1942 there in Puukapu Homesteads steal two Parker Ranch cows, one with a six or seven months old calf inside it and one with a two months old calf inside it, slaughter them and boil the inborn calves and hides?"

"Q. When were you married?

A. 1931, about.

Q. During the years 1936, 1937 did you not have an adultery relationship with one * * * (naming woman)?

Mr. Esposito: I object. There must be an arrest and conviction.

Q. And as a result of that relationship was there not born a child * * * (naming child) on August 1, 1937, at the Kau Hospital?

Mr. Esposito: Objection. There is no conviction. It is incompetent, irrelevant and immaterial.

The Court: I will allow the question."

Thus it can be seen, the brief's assignment of error states appellant's motion to the trial Court for a mistrial on the ground of allowance of these questions. That these offensive and degrading questions were answered in the negative does not make the contention of appellant's brief that the questions themselves were highly prejudicial any the less a justiciable one.

Then follows a citation of federal and state authorities cogently discussed in but seven pages of briefing.

In every respect these contentions were briefed in full compliance with the rules and were entitled to the judicial process of their consideration and decision.

Petitioner has had competently presented for him in each of the briefs in the two cases before the Hawaiian Supreme Court at least one justiciable contention which, if sustained, well may require reversal.

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said Court in said cause be reviewed and reversed.

Dated, Honolulu, Hawaii,
January 19, 1948.

O. P. SOARES,
Counsel for Petitioner.

Subject Index

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Summary statement of the matter involved	2
Argument	3
No federal question was presented in the appeal to the court below	4
Petitioner was not denied due process of law	6
Conclusion	12
Appendix	i

Table of Authorities Cited

Cases	Page
American Surety Co. v. United States, 239 F. 680	5
Barrington v. Missouri, 205 U.S. 483, 27 S. Ct. 582, 51 L. Ed. 890	6
Bengoechea Macias v. De La Torre & Ramirez, 84 F. 2d. 894	6
Brown, Cecil, Estate of, 24 Haw. 711	10
City and County of San Francisco v. Jane Scott, 111 U.S. 768, 4 S. Ct. 688, 28 L. Ed. 593	6
Flournoy v. Wiener, 64 S. Ct. 548, 321 U.S. 253, 88 L. Ed. 708	1
Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582	10
Fukunaga v. Territory of Hawaii, 33 F. 2d. 396, 397, certiorari denied 280 U.S. 593-594	7
Furtado v. Rezents, 33 Haw. 569	9
Gallardo v. Gonzales, 143 F. 2d. 947, 949	7
Hoffman v. United States, 68 F. 2d. 101, 104	8
Holiona v. Kamai, 24 Haw. 636	10
Jessionowski v. Boston Main Railroad, 67 S. Ct. 401, 404	8
Kimbrel v. Territory of Hawaii, 41 F. 2d. 740	6
Laahia v. Poomaikai, 20 Haw. 39	10
Lovvorn v. Johnston, 118 F. 2d. 704, 706, certiorari denied 314 U.S. 607	5
Luckenbach S.S. Co. v. United States, 272 U.S. 533, 536	4
Martinez v. Sancho, 108 F. 2d. 960, 961	6
Meyer v. Territory of Hawaii, 164 F. 2d. 845	1
Muyres v. United States, 89 F. 2d. 783, 784	8
Nukushina, Estate of, 33 Haw. 658	10
Ramos v. Leahy, 111 F. 2d. 955	6
Rescue Army v. Municipal Court, 331 U.S. 549, 584	11

Pages

Sovereign Camp of the Woodmen of the World v. Jackson, 97 F. 382, 385 8
Succession of Tristani v. Colon, 71 F. 2d. 374, 375..... 6

Territory of Hawaii v. Meyer, 37 Haw. 102..... 2
Territory v. Taok, 33 Haw. 560, 564 8
Tinkoff v. United States, 86 F. 2d. 868, 881, certiorari denied 57 S. Ct. 795, 301 U.S. 689, 81 L. Ed. 1346, rehearing denied 57 S. Ct. 937, 301 U.S. 715, 81 L. Ed. 1366..... 5

Waialua Co. v. Christian, 305 U.S. 91, 107-108 7
Watumull v. Tax Commissioner, 34 Haw. 84 9
West v. State of Louisiana, 194 U.S. 258, 24 S. Ct. 650, 48 L. Ed. 965 6
Wheeler v. United States, 77 F. 2d. 216, 218 8

Young v. Territory of Hawaii, 160 F. 2d. 289, certiorari denied 331 U.S. 849 ..... 3, 7

Statutes

Judicial Code, as amended, Section 128 .....4, App. i
Judicial Code, as amended by Act of February 13, 1925, Section 240 (a) 2

Revised Laws of Hawaii 1945:
Section 9551 5
Section 9555 .....5, App. i
Section 9613 .....5, App. i

28 U.S.C.A. Section 225 (a) .....4, 6, App. i
28 U.S.C.A. Section 347 (a) 2

Rules

Rules of the Supreme Court adopted February 13, 1939, effective February 27, 1939, Rule 38 (2) 1, 8
Rules of the Supreme Court of the Territory of Hawaii:
Rule 3, par. 1 (d) .....4, App. i
Rule 3, par. 1 (e) .....3, App. ii

In the Supreme Court
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OCTOBER TERM, 1947

No. 570

CARL MEYER, *Petitioner,*

vs.

TERRITORY OF HAWAII, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION[1] TO PETITION FOR WRIT OF CERTIORARI, to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINION BELOW.

The majority opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 320-335) is reported in 164 F. 2d. 845. The dissenting opinion in that

[1]It is to be noted that petitioner did not annex a supporting brief to his petition for writ of certiorari nor was such brief separately presented. In this respect petitioner has failed to comply with Rule 38(2) of the Rules of the Supreme Court adopted February 13, 1939, effective February 27, 1939. This alone is sufficient reason for denying the petition. See cases cited under said Rule 38(2), also *Flournoy v. Wiener*, La., 1944, 64 S. Ct. 548, 321 U.S. 253, 88 L. Ed. 708.

Court (R. 335-346) is reported in 164 F. 2d. 851. The opinion of the Supreme Court of the Territory of Hawaii (R. 298-302) is reported in 37 Haw. 102.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 2, 1947 (R. 346). The petition for writ of certiorari was filed on February 4, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Sec. 347(a)).

QUESTIONS PRESENTED.

The following questions are presented:

1. Did the Circuit Court of Appeals have appellate jurisdiction in this case?

2. Did the dismissal of the writ of error by the Supreme Court of the Territory of Hawaii violate the due process clause of the Fifth Amendment of the Constitution of the United States?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

To the petitioner's summary statement of the matter involved as set forth in his petition on pages 2 to 4, respondent respectfully calls the Court's attention to the fact that the Supreme Court of the Territory of Hawaii dismissed the writ of error not only for the

ground stated by petitioner but also because the matters involved were "not properly briefed in conformity to the requirement of paragraph 1(e), supra" (Rules of the Supreme Court of the Territory of Hawaii, rule 3, par. 1(e), 36 Haw. 753). For a complete statement of the opinion of the Supreme Court of Hawaii, see the pages 298 to 302 of the printed record of this Court.

Another fact which respondent feels should be borne in mind when considering the judgment of the Court below is the fact that the record before the Court below and now before this Court did *not* contain a transcript of the testimony and the exhibits introduced at the trial. This transcript was specifically excluded from the record. (See R. p. 13).

ARGUMENT.

The reasons relied upon by petitioner for allowance of the writ of certiorari (pages 5 to 13 of the petition for writ of certiorari) are an almost verbatim repetition of the dissenting opinion of Circuit Court Judge Denman in the Court below (R. 335-346). The majority opinion of that Court (R. 320-335), which respondent respectfully submits is well considered and well grounded, is a full and conclusive answer thereto.

The ruling of the majority opinion in the Court below is in conformity with its previous ruling in the case of *Young v. Territory of Hawaii,* 160 F. 2d.

289, certiorari denied June 16, 1946, 331 U.S. 849. It is interesting to note that Circuit Court Judge Denman also dissented in the latter case.

No federal question was presented in the appeal to the Court below.

The only basis for the exercise of appellate jurisdiction by the Court below lies in paragraph (a) (Fourth) of Section 128 of the Judicial Code as amended, 28 U.S.C.A. Sec. 225 (a) (Fourth) (See appendix hereto). It is submitted that the Constitution or a statute or treaty of the United States or any authority exercised thereunder is not involved herein.

The only question involved is purely a local matter, namely, the interpretation and construction and application of Rule 3, paragraph 1 (d) and 1 (e) of the Rules of the Supreme Court of the Territory of Hawaii. (See appendix.)

It is not urged by petitioner that the rules of the Hawaii Supreme Court or any portion thereof are unconstitutional.

Before discussing the above-mentioned rule it might be well at the outset to observe that the right to an appeal, even in the continental United States, is not in and of itself a constitutional right. As the Court below stated "appellate review is not essential to due process of law, but is a matter of grace", citing *Luckenbach S.S. Co. v. United States,* 272 U.S. 533, 536. By making this observation we do not wish to have the Court infer that petitioner was denied the

right to appeal. It was accorded to him, but was not exercised or perfected and carried to its conclusion in the manner and form prescribed by the applicable rules which within their limited ambit have the force of law. The right to appeal is purely statutory and the legislature and the courts within their granted powers may affix such conditions thereto as seem fit.

Tinkoff v. United States, CCA-7, 86 F. 2d. 868, 881, certiorari denied 57 S. Ct. 795, 301 U.S. 689, 81 L. Ed. 1346, rehearing denied 57 S. Ct. 937, 301 U.S. 715, 81 L. Ed. 1366;

American Surety Co. v. United States, CCA-5, 239 Fed. 680;

Lovvorn v. Johnston, CCA-9, 118 F. 2d. 704, 706, certiorari denied 62 S. Ct. 92, 314 U.S. 607, 86 L. Ed. 488.

In the instant case the right to appeal from the Circuit Court of the Territory of Hawaii to the Supreme Court of the Territory of Hawaii is fixed by Hawaiian law, not federal law or the organic law. Sections 9551 and 9555 of the Revised Laws of Hawaii 1945. (See appendix.)

It is, therefore, a matter fixed and determined exclusively by local law and involves no statute of the United States.

The rules of the Supreme Court of the Territory of Hawaii are fixed by that Court pursuant to local statutory authority, Section 9613 of the Revised Laws of Hawaii 1945 (See appendix), and are purely local in nature.

It, therefore, follows that an interpretation, construction or application of the rules of the Supreme Court of Hawaii does not involve either the constitution or laws of the United States.

Kimbrel v. Territory of Hawaii, CCA-9, 41 F. 2d. 740;

Ramos v. Leahy, CCA-1, 111 F. 2d. 955;

Martinez v. Sancho, CCA-1, 108 F. 2d. 960, 961;

Bengoechea Macias v. De La Torre & Ramirez, CCA-1, 84 F. 2d. 894;

Succession of Tristani v. Colon, CCA-1, 71 F. 2d. 374, 375;

Barrington v. Missouri, 205 U.S. 483, 27 S. Ct. 582, 51 L. Ed. 890;

City and County of San Francisco v. Jane Scott, 111 U.S. 768, 4 S. Ct. 688, 28 L. Ed. 593;

West v. State of Louisiana, 194 U.S. 258, 24 S. Ct. 650, 48 L. Ed. 965.

From the foregoing it should be clear that the Court below not only properly affirmed the judgment of the Supreme Court of the Territory of Hawaii but could well have dismissed the appeal for lack of jurisdiction under the applicable provisions of 28 U.S. C.A. Section 225 (a).

Petitioner was not denied due process of law.

Assuming arguendo that a federal question is lurking in this record we respectfully submit that such question is not real and substantial. The question here involved is less real and less substantial than

that presented in *Young v. Territory of Hawaii,* supra.

See also: *Fukunaga v. Territory of Hawaii,* CCA-9, 33 F. 2d. 396, 397, certiorari denied 280 U.S. 593-594.

When reviewing the rulings of a territorial court judicial tradition gives substance to the rule of this Court "that deference shall be paid the understanding of territorial courts on matters of local concern." *Waialua Co. v. Christian,* 305 U.S. 91, 107-108. In that case this Court further said:

> "* * * It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. * * * In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. *Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii."* [Emphasis supplied].

See also *Gallardo v. Gonzales,* CCA-1, 143 F. 2d. 947, 949.

The position taken by the Supreme Court of the Territory of Hawaii in dismissing the writ of error was not novel, fanciful or capricious, but in fact was

in conformity with the practice followed by this and other appellate courts throughout the country. The decisions of this Court to that effect are cited under its rule 38 (2). To those may be added the following:

Jessionowski v. Boston Maine Railroad, 67 S. Ct. 401, 404;

Sovereign Camp of the Woodmen of the World v. Jackson, CCA-8, 97 Fed. 382, 385;

Wheeler v. United States, CCA-9, 77 F. 2d. 216, 218;

Muyres v. United States, CCA-9, 89 F. 2d. 783, 784;

Hoffman v. United States, CCA-10, 68 F. 2d. 101, 104.

The above and many other authorities clearly illustrate that it is not unreasonable for an appellate court to dismiss an appeal where the appellant has failed to comply with the rules relative to specifications of error—especially when the Court has given previous warnings that the rule will be enforced.

Such previous warnings have been repeatedly given by the Supreme Court of Hawaii. In *Territory v. Taok,* 33 Haw. 560, 564, the Court said:

> "The appellant absolutely failed to comply with the provisions of rule 3 (b) of this Court that the brief contain 'a specification of the exceptions or assigned errors which are relied upon'. Failure to observe the rule may merit dismissal."

The Court in said case, however, considered the merits of the case obviously for the reason that the

appellant was found guilty and sentenced for the offense of gross cheat upon an information which did not allege an offense under the criminal statutes of the Territory of Hawaii. It is apparent that the Court had no jurisdiction when no offense was committed by the appellant.

In *Furtado v. Rezents,* 33 Haw. 569, the Court stated,

> "No specifications of error are included in appellant's brief as required by the rule of the court. This is a fault of recurring frequency and if persisted in the court for its own protection will be compelled to resort to punitive measures."

The power to dismiss appeals and writs of error for violation of rules of the Court, being discretionary, was not exercised by the Court in the above-mentioned cases, apparently because the violation was not too flagrant.

However, in *Watumull v. Tax Commissioner,* 34 Haw. 84, on a motion to dismiss a writ of error for failure to comply with rule 3 (b) (in force since June 1, 1921, see 25 Haw. 825, 826) which is now rule 3 (d), the Court held,

> "Equally objectionable and deficient is the brief of plaintiffs in error. It contains no specifications of error required by rule 3 (b) of the Supreme Court. This court has repeatedly called the attention of litigants and the bar to the requirements of this rule."

It is further submitted that the Supreme Court of the Territory of Hawaii had dismissed writ of error in other cases for violations of other rules of court, which are apparently more technical than those invoked by the Hawaii Supreme Court in this case.

Writ of error dismissed for failure to file necessary papers within 20 days.

Laahia v. Poomaikai, 20 Haw. 39;
Holiona v. Kamai, 24 Haw. 636.

Appeal dismissed for failure to file necessary papers within twenty days.

Estate of Cecil Brown, 24 Haw. 711;
Estate of Nukushina, 33 Haw. 658.

Petitioner seeks to have this Court, as he sought to have the Court below do, substitute its judgment for that of the Supreme Court of the Territory of Hawaii in the interpretation, construction and application of the rules of the Supreme Court of Hawaii. He suggests that *Frank v. Mangum,* 237 U.S. 309, 35 S. Ct. 582, supports his position. Yet in that case, 237 U.S. at pages 334, 335, the Court referring to due process of law, said:

> "This familiar phrase does not mean that operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the courts or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases."

See also *Rescue Army v. Municipal Court,* 331 U.S. 549, 584.

We can best close by quoting the concluding language of the majority opinion of the Court below:

> "The elaborate and carefully considered opinion of the court below in the instant case discloses that its dismissal of the writs of error was not done 'arbitrarily.'
>
> "Applying the teaching of the Supreme Court of the United States in the Waialua Co. case, supra, we find that the decision of the Territorial court is 'in conformity with the Constitution and the applicable statutes of the United States,' is not 'manifestly' erroneous in its 'statement or application of governing principles,' and should 'be accepted as stating the law of the Territory.'
>
> "Therefore, there being no 'clear departure from ordinary legal principles,' we are of the opinion that, even if we were to feel that greater leniency might have been extended to the appellant herein, 'the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.' Waialua Co. v. Christian, supra." (R. 335.)

Before concluding it might here be added that it is difficult to see how any appellate court can determine whether or not there has been a denial of due process of law, when the heart of the record in the trial court, the transcript of the testimony and the exhibits, is lacking.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct, and in view of the fact that the interpretation and construction by a Court of its own rules has been consistently upheld unless manifestly and inescapably erroneous, it cannot be said that there was a "far departure from the accepted and usual course of judicial proceedings".

The decision of the Court below is not in conflict with decisions in this Court or other circuit courts of appeals, nor is it in conflict with applicable local decisions, nor does it present any substantial constitutional question, which has not been, but should be settled by this Court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
March 5, 1948.

A. J. ZIRPOLI,
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TOM OKINO,
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Deputy Attorney General, Territory of Hawaii,
HENRY W. ROBINSON,
Of Counsel.

(Appendix Follows.)

Appendix

STATUTES INVOLVED.

Section 128 of the Judicial Code, as amended (28 U.S.C.A. Sec. 225) provides in part:

> "(a) Review of final decisions. The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions—
>
> * * * *
>
> "Fourth. In the Supreme Courts of the Territory of Hawaii and of Puerto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; * * *."

Section 9555 of the Revised Laws of Hawaii 1945, provides:

> "A writ of error may be had as of right in term time or in vacation upon the application of a defendant in a criminal case or of any party in a civil case, or of any legal or personal representative of a deceased party in a civil case."

Section 9613 of the Revised Laws of Hawaii 1945, provides:

> "Rules. The supreme court may, from time to time, make rules consistent with existing laws for regulating the practice and conducting the business of the court, and thereafter revise such rules at its discretion; but in no case shall have power to impose costs not expressly authorized by law. * * *"

The Rules of the Supreme Court of the Territory of Hawaii. Rule 3, paragraph 1 (d) (Rules of the

Supreme Court of the Territory of Hawaii, 36 Haw. 753) provides *inter alia* that an appellant's brief

> "shall contain . . . a specification of the errors which are relied upon".

Rule 3, paragraph 1 (e) provides *inter alia* that an appellant's brief

> "shall contain . . . a brief of the argument exhibiting a clear statement of the points of law or fact to be discussed and the authorities relied upon in support of each point".